10-0907-12803-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF PSYCHOLOGY

In the Matter of the Psychology License of Richard J. Anderson, M.S., L.P., License No. LP 0004.

ORDER ON MOTION FOR SUMMARY DISPOSITION

The above-entitled matter is before the undersigned Administrative Law Judge on the motion of the Board of Psychology (the Board) for summary disposition.

Michael J. Weber, Assistant Attorney General, 445 Minnesota Street, Suite 1400, St. Paul, Minnesota 55101-2131, filed the Motion on behalf of the Board. Michael D. Klampe, Klampe, Delehante & Morris, 300 Broadstreet Building, 300 First Avenue NW, Rochester, Minnesota 55901, represents the Licensee, Richard J. Anderson. The record closed on this motion on April 11, 2000, upon receipt of the final posthearing brief on the Motion.

Based on the record in this matter, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Board of Psychology's Motion for Summary Disposition be GRANTED on all issues regarding grounds for taking disciplinary action against the psychology license of Richard J. Anderson.

2. The Board's Motion be denied regarding the Licensee's right to a hearing to present evidence in mitigation and in regards to the propriety of any particular disciplinary action.

Dated this _16th_ day of May, 2000.

/s/ Kenneth A. Nickolai
KENNETH A. NICKOLAI
Administrative Law Judge

MEMORANDUM

The Board has moved for summary disposition of this matter, asserting that no issues remain for hearing. The Board maintains that the conviction of Richard J. Anderson on two felony counts of fraud by submission of false claims to the Medical Assistance program (MA) disposes of all issues present here as a matter of law. Licensee asserts that the criminal conviction cannot be used to demonstrate violations of professional standards. The Licensee maintains that, since he entered into an ***Alford/Goulette*** plea in the criminal proceeding, the conviction carries no collateral estoppel effect.[1]

Summary disposition is the administrative equivalent of summary judgment.[2] Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[3] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[4]

The Board, as the moving party, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist this motion for summary disposition, the nonmoving party, the Licensee, must show that specific facts are in dispute which have a bearing on the outcome of the case.[5] The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn.R.Civ.P. 56.05.[6] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.[7] The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party.[8]

Based upon the pleadings and affidavits submitted in this matter, and construing the facts in the light most favorable to the Licensee, the underlying facts in this matter appear to be as follows:

In April 1998, Licensee was charged with eight felony counts of theft by misrepresentation or swindle, based on Licensee's MA billing practices.[9] The charge was twice amended, reducing the number of charges to seven. On July 14, 1999, Licensee entered into a plea agreement whereby Licensee would enter an ***Alford/Goulette*** plea to two consolidated counts, one of felony Theft by Swindle and the other of felony Medical Assistance Fraud.[10] Licensee agreed to make restitution in the amount of $58,000 and the prosecutor agreed to remain silent on the issues of jail time, probation period, and a fine. On July 16, 1999, Licensee pled guilty to the two felony counts pursuant to the ***Alford/Goulette*** plea.[11] On August 25, 1999, Ramsey County District Court Judge Mary Louise Klas sentenced Licensee to probation for twenty years on Count 1 and ten years on Count 2 and to make restitution in the amount of $58,000.[12]

In this matter, the Board has cited a violation of Minn. Stat. § 148.941, subd. 2(a) as a ground for taking adverse action against the Licensee. Minn. Stat. § 148.941, subd. 2(a) states in pertinent part:

> Subd. 2. Grounds for disciplinary action; forms of disciplinary action. (a) The board may impose disciplinary action as described in paragraph (b) against an applicant or licensee whom the board, by a preponderance of the evidence, determines:
> (1) has violated a statute, rule, or order that the board issued or is empowered to enforce;
> (2) has engaged in fraudulent, deceptive, or dishonest conduct, whether or not the conduct relates to the practice of psychology, that adversely affects the person's ability or fitness to practice psychology;
> (3) has engaged in unprofessional conduct or any other conduct which has the potential for causing harm to the public, including any departure from or failure to conform to the minimum standards of acceptable and prevailing practice without actual injury having to be established;
> (4) has been convicted of or has pled guilty or nolo contendere to a felony or other crime, an element of which is dishonesty or fraud, or has been shown to have engaged in acts or practices tending to show that the applicant or licensee is incompetent or has engaged in conduct reflecting adversely on the applicant's or licensee's ability or fitness to engage in the practice of psychology;
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> * * * *

Judge Klas found Licensee guilty of two felony offenses, each with an element of fraud. Those findings demonstrate every element required by Minn. Stat. § 148.941, subd. 2(a)(4) for taking adverse action against a license. Licensee asserts that the nature of his plea precludes any use of the conviction outside the criminal proceeding itself.

There is no question under current caselaw that a guilty plea can be used to preclude relitigating issues.[13] Precluding issues is often referred to as "offensive" collateral estoppel. Licensee entered into an ***Alford/Goulette*** plea, whereby he maintained his innocence but accepted that sufficient facts existed on which he could be convicted. This form of plea, the Licensee asserts, renders the fact of the guilty plea irrelevant for any other proceeding outside of the criminal conviction. The Board maintains that the language in Minn. Stat. § 148.941, subd. 2(a)(4) extending the conviction to guilty pleas and pleas of *nolo contendere*, renders the conviction available for use to collaterally estop the Licensee from disputing the factual basis for imposing discipline.

The plea of *nolo contendere* is not available in Minnesota.[14] There is substantial similarity between a plea of *nolo contendere* and an ***Alford/Goulette*** plea. In both, the defendant asserts innocence, recognizes that evidence exists sufficient to convict, and declines to defend. The only meaningful difference is that a plea of *nolo contendere* has been held not to be a conviction.[15]

With the similarity of the two pleas, there has been significant caselaw on the impact of each type of plea on subsequent matters. A detailed analysis was presented by the First Circuit Court of Appeals which stated:

> There is a line of cases permitting the use of convictions that follow from *nolo* pleas. These cases, which distinguish between the plea and the conviction, primarily involve statutes that attach some consequence to the fact of a "conviction" (such as multiple-offender statutes). *See, e.g.,* ***Myers***, 893 F.2d at 843-44 (admitting evidence of a *nolo* conviction as proof of the facts underlying the crime on the grounds that Rule 410 and Rule 11(e)(6) do not apply in an administrative proceeding and that proof of a *nolo* conviction has been admitted in a variety of cases, especially those where "a statute or judicial rule attaches legal consequences to the fact of a conviction"); ***Pearce v. United States Dep't of Justice, Drug Enforcement Admin.***, 836 F.2d 1028, 1029 (6th Cir. 1988) (interpreting "conviction" as used in 21 U.S.C. § 824 to include a conviction based on a *nolo contendere* plea, since "[n]otwithstanding Rule 410, a conviction pursuant to a *nolo contendere* plea is a conviction within the meaning of the statute and gives rise to a variety of collateral consequences in subsequent proceedings"); ***Crofoot v. United States Gov't Printing Office***, 761 F.2d 661, 665 (Fed. Cir. 1985) (upholding the use of a conviction pursuant to an ***Alford*** plea in a Merit Systems Protection Board review of an employee's removal by analogizing to cases permitting the use of convictions pursuant to *nolo* pleas); *see also* Fed. R. Crim. P. 11(e)(6) advisory committee's notes, 1974 amendment ("A judgment upon the plea is a conviction and may be used to apply multiple offender statutes.").[16]

The language of Minn. Stat. § 148.941, subd. 2(a)(4), expressly treats guilty pleas and pleas of *nolo contendere* as grounds for taking adverse action against licenses. Licensee's ***Alford/Goulette*** plea does not confer any greater privilege than a plea of *nolo contendere*. The ***Alford/Goulette*** plea has the effect of a conviction under Minn. Stat. § 148.941, subd. 2(a)(4).[17] Such a conviction has collateral estoppel effect when sanctions are brought against a license under Minn. Stat. § 148.941, subd. 2(a)(4). There are no genuine issues of material fact regarding the conviction. As a matter of law, the Board is entitled to take adverse action against the Licensee for violating Minn. Stat. § 148.941, subd. 2(a)(4).

Licensee asserts that the Board is bound by Minn. Stat. § 364, which requires assessment of rehabilitation in professions where state licensure is required. But Minn. Stat. § 214.10 requires the Board to initiate proceedings to suspend or revoke the license of any licensee “convicted in a court of competent jurisdiction of violating sections 609.23, 609.231, 609.465, 609.466, 609.52, or 626.557.” The complaint (as finally amended) in the Licensee's criminal proceeding cites Minn. Stat. § 609.52 as the statute violated in each count and Minn. Stat. § 609.466 as violated in one count.

Minn. Stat. § 214.10 creates a rebuttable presumption that a conviction for violating any of the listed statutes is a ground for suspension or revocation of a psychologist's license. While the statute creates a rebuttable presumption regarding general license provisions, the Minnesota Supreme Court has held that specific licensure provision take precedence over general provisions.[18]

Minn. Stat. § 148.941, subd. 2(b-d) authorizes the Board to take the following disciplinary action:

> (b) If grounds for disciplinary action exist under paragraph (a), the board may take one or more of the following actions:
> (1) refuse to grant or renew a license;
> (2) revoke a license;
> (3) suspend a license;
> (4) impose limitations or conditions on a licensee's practice of psychology, including, but not limited to, limiting the scope of practice to designated competencies, imposing retraining or rehabilitation requirements, requiring the licensee to practice under supervision, or conditioning continued practice on the demonstration of knowledge or skill by appropriate examination or other review of skill and competence;
> (5) censure or reprimand the licensee;
> (6) refuse to permit an applicant to take the licensure examination or refuse to release an applicant's examination grade if the board finds that it is in the public interest; or
> (7) impose a civil penalty not exceeding $5,000 for each separate violation. The amount of the penalty shall be fixed so as to deprive the applicant or licensee of any economic advantage gained by reason of the violation charged, or to discourage repeated violations.
> (c) In lieu of or in addition to paragraph (b), the board may require, as a condition of continued licensure, termination of suspension, reinstatement of license, examination, or release of examination grades, that the applicant or licensee: (1) submit to a quality review, as specified by the board, of the applicant's or licensee's ability, skills, or quality of work; and (2) complete to the satisfaction of the board educational courses specified by the board.
> (d) Service of the order is effective if the order is served on the applicant, licensee, or counsel of record personally or by mail to the most recent address provided to the board for the licensee, applicant, or counsel of record. The order shall state the reasons for the entry of the order.

The existence of a specific statute identifying the range of discipline that may be imposed when a licensee is convicted of certain crimes renders the rebuttable presumption of Minn. Stat. § 214.10 inapplicable to this matter. Similarly, the rehabilitation analysis of Minn. Stat. § 364 is inapplicable, since the Legislature's intent is clearly expressed in Minn. Stat. § 148.941, subd. 2, and that statutory provision authorizes discipline.

In order to choose from the range of available discipline, the Board must have a record of facts supporting the discipline that is to be imposed. This record of facts is also needed to address any issues of mitigation. As the Supreme Court stated in ***Falgren***:

> Moreover, section 125.09, subd. 1(1) provides that the Board may revoke a teacher's license if the teacher has engaged in immoral conduct; the legislature does not require that the teacher's license be revoked based on such a finding. Thus, we hold that even though collateral estoppel may be applied to the issue whether Falgren engaged in nonconsensual sexual contact with I.B., the ALJ [Administrative Law Judge] must still consider any additional evidence the defendant may wish to present concerning the alleged immorality of his or her conduct and whether the ALJ should recommend revocation based exclusively on immoral conduct.[19]

The Minnesota Supreme Court's holding in ***Falgren*** explicitly requires consideration of factual issues regarding appropriate discipline and mitigation.[20] While the Administrative Law Judge does not make any recommendation regarding discipline, the factual record forms the basis for the Board's order imposing discipline. Licensee has demonstrated that genuine issues of material fact remain for hearing in this matter regarding issues of appropriate discipline and mitigation.

The Licensee's ***Alford/Goulette*** plea resulted in convictions on one count of Minn. Stat. § 609.52 and one count of Minn. Stat. §§ 609.466 and 609.52. Fraud is an element of each offense. These convictions meet the standards of Minn. Stat. § 148.941, subd. 2(a)(4), for imposing discipline. There are no material issues of fact remaining on the issue of whether discipline may be imposed on the Licensee. Summary disposition is appropriate on this issue. The Board's Motion for Summary Disposition is GRANTED regarding issues of whether discipline may be imposed. That Motion is DENIED regarding factual issues of what discipline is appropriate and whether mitigating factors exist for imposing lesser discipline.

K.A.N.

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[1] Alford pleas are named after ***North Carolina v. Alford***, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), where the defendant pleads guilty to an offense, even though the defendant maintains his or her innocence, if (1) the defendant reasonably believes and (2) the record establishes, that the State has sufficient evidence to obtain a conviction. These pleas were adopted in Minnesota under the holding in ***State v. Goulette***, 258 N.W.2d 758, 760 (Minn.1977).

[2] Minn. Rule 1400.5500(K).

[3] ***Sauter v. Sauter***, 70 N.W.2d 351, 353 (Minn. 1955); ***Louwagie v. Witco Chemical Corp.***, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn.R.Civ.P. 56.03 (2000).

[4] ***Illinois Farmers Insurance Co. v. Tapemark Co.***, 273 N. W.2d 630, 634 (Minn. 1978); ***Highland Chateau v. Minnesota Department of Public Welfare***, 356 N.W. 2d 804, 808 (Minn. App. 1984).

[5] ***Hunt v. IBM Mid America Employees***, 384 N.W.2d 853, 855 (Minn. 1986).
[6] *Id*.; ***Murphy v. Country House, Inc.***, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); ***Carlisle v. City of Minneapolis***, 437 N.W.2d 712, 715 (Minn.App. 1988).
[7] ***Carlisle***, 437 N.W.2d at 715 (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986)).
[8] *See* ***Celotex***, 477 U.S. at 325; ***Thiele v. Stich***, 425 N.W.2d 580, 583 (Minn. 1988); ***Greaton v. Enich***, 185 N.W.2d 876, 878 (Minn. 1971); ***Dollander v. Rochester State Hospital***, 362 N.W.2d 386, 389 (Minn.App. 1985).
[9] Exhibit A, at 1-16.
[10] Exhibit E.
[11] Exhibits G and H.
[12] Exhibits I and J.
[13] ***Nevins v. Christopher Street, Inc.***, 363 N.W.2d 891 (Minn.App. 1985).
[14] ***State v. Kiewel***, 207 N.W. 646, 647 (Minn. 1926).
[15] ***Agnew v. State***, 446 A.2d 425, 446 (Md.App. 1982), *cert. denied* 294 Md. 441 (1982). *See also* Maryland Court Rule 4-242(d). *But see* ***Maryland State Bar Ass'n v. Agnew***, 318 A.2d 811, 814 (Md. 1974)(under rule governing attorney licensure, a *nolo contendere* plea is "conclusive proof" of guilt).
[16] ***Olsen v. Correiro***, 189 F.3d 52, 61 (1st Cir. 1999).
[17] In ***Eisenberg v. Commonweath, Dept. of Public Welfare***, 516 A.2d 333 (Pa. 1986), a Medicare provider was barred from the program for conviction on charges of mail fraud and denied an administrative hearing. In that matter, the Pennsylvania Supreme Court stated:

> Here, although the plea was an *Alford nolo contendere* plea, a certified copy of the judgment of sentence was included in the administrative record. (Record citation omitted). This is all the proof of conviction required by the regulation, and it is conclusive for the reasons set out in ***Sokoloff***, *supra* [Sokoloff v. Saxbe, 501 F.2d 571 (2nd Cir. 1974)]. ***Eisenberg***, 516 A.2d at 337.

[18] ***Falgren v. State, Bd. of Teaching***, 545 N.W.2d 901, 907 (Minn. 1996).
[19] ***Falgren***, 545 N.W.2d at 908. In actual fact, the matter was not remanded for a hearing and recommendation, since Falgren had died prior to the issuance of the Supreme Court's decision.
[20] See also, ***Eisenberg***, 516 A.2d at 337, where the Pennsylvania Supreme Court noted that the Department of Public Welfare was granted discretion as to the penalty to be imposed and stated:

> Such language requires the exercise of departmental discretion. The exercise of discretion without a hearing or record permits at least uninformed bureaucratic action and risks unreasonable arbitrary action. Indeed, our previous decision in this case, allowing prehearing penalty, was explicitly based on the availability of full hearings before a final determination of the penalty. (Citations omitted).